U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 July 2004

CASE NO.: 2003-LHC-2054

OWCP NO.: 07-160651

IN THE MATTER OF

CHARLENE M. HILLIARD,
Claimant

v.

ZEN-NOH GRAIN CORP.,
Employer

and

FARMLAND MUTUAL INSURANCE CO.,
Carrier

APPEARANCES:

WILLIAM R. MUSTIAN, III, ESQ.
On behalf of the Claimant

CHARLES M. LANIER, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Charlene M.

Hilliard (Claimant) against Zen-Noh Grain Corp. (Employer) and Farmland Mutual Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Metairie, Louisiana, on May 17, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1;
2. Claimant's Exhibits 1-8; and
3. Employer's Exhibits 1-17.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

1. Employer/employee relationship at time of accident: Yes.

2. Date Notice of Controversion filed: August 15, 2001.

3. Date of informal conference: April 18, 2002.

4. Average weekly wage at time of injury: $481.22.

5. No compensation benefits or medical benefits have been paid.

II. ISSUES

The unresolved issues in this proceeding are:

1. Fact of accident/injury.

2. Notice to employer.

3. Disability/causation.

4. Reasonable and necessary medical treatment.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a thirty-nine year old high school graduate. (Tr. 8). She began working for Employer as a laborer in May 2000. (Tr. 8-9). Her duties included cleaning up and picking up things. She also had to monitor the grain count in the dust tanks. (Tr. 9). This task involved climbing four or five flights of stairs and a ladder on the side of the tank. Claimant then had to take the metal cover off the tank by pulling on a rope. She estimated that it weighed about fifty to seventy pounds. On an average day, Claimant performed this task about three or four times. (Tr. 10).

Claimant testified that on August 24, 2000, she was pulling the cover off a dust tank when she felt a sharp pain in her right hand and along her lower spine. (Tr. 11-12). She rested for a few moments before returning to work. Claimant testified that although she completed work that day without reporting the incident to anyone, she was in a lot of pain. She explained that she did not report the incident because she suspected that her pain was due to flu. (Tr. 12). Claimant went to work for the next two days and was off work that weekend. On Monday, she called in sick and went to the emergency room, where x-rays were taken and tests were run. (Tr. 13). She returned to work the next day and gave her medical paperwork to the lead man. (Tr. 14). Claimant acknowledged that the paperwork indicated that she was able to return to work as of August 29 but did not indicate her specific medical problems. (Tr. 24-25).

Claimant's last day of work was on or about September 3, 2000. (Tr. 14). She testified that she first reported her workplace accident on September 6. At that time, Claimant told Eric Slater that she had paperwork from her family physician explaining that she was unable to return to work pending further treatment of her condition. (Tr. 15). Claimant told Mr. Slater that she had begun experiencing body and joint aches on August 24 but did not specifically report that she had been injured at work. (Tr. 15, 20-22). While she remained off work, Claimant had to call in every Friday morning to report on her condition. (Tr. 27-28). She continued to make these calls from September 2000 through October 2002. (Tr. 28). She did not recall ever specifically telling the plant manager or supervisors that she had been injured at work while lifting a dust tank cover. (Tr. 28-29).

After Claimant stopped working, she began treating with Dr. John Watermeier. (Tr. 16). When she filled out a history sheet at his office during her initial visit, Claimant did not indicate that she had been involved in a work accident. (Tr. 22). Claimant submitted her medical bills to her health insurance company, as opposed to the workers' compensation carrier. (Tr. 22-23). Most of those bills were paid until the premium ran out and the policy was cancelled in July 2001. (Tr. 23). Claimant denied that she started

claiming payment of bills through workers' compensation after her health insurance policy was cancelled. (Tr. 23-24).

Dr. Watermeier treated Claimant with pain medication. (Tr. 17). Claimant also did some physical therapy but stopped because it aggravated her pain. (Tr. 17-18). In June 2001, Claimant underwent surgery for carpal tunnel syndrome. (Tr. 17). Dr. Watermeier released her to light duty in April 2003. (Tr. 26). Since that time, Claimant has applied for several light duty jobs but has not been hired. (Tr. 18-19). She testified that she told the prospective employers that she was on light duty for a work-related back problem and that she was taking medication. (Tr. 26). Although she no longer experiences hand pain, Claimant is unable to use her hands to full capacity. (Tr. 17). She testified that she continues to suffer from chronic neck and back pain and has difficulty doing normal household tasks. (Tr. 17, 19). Claimant currently takes narcotic pain medication twice a day. She testified that it causes drowsiness so she is unable to do much during the day. (Tr. 18).

Testimony of Eric Slater

Mr. Slater is Employer's assistant facility manager. In August and September 2000, he was the plant's general superintendent, and he was responsible for talking to employees that were out from work for illness or work-related injuries. (Tr. 30). According to Mr. Slater, Claimant originally was out from work for the flu, and he never asked her the medical details of her condition because of privacy concerns. (Tr. 34). Mr. Slater testified that when Claimant called in on September 6, 2000, she did not report that she was injured at work. He estimated that over the course of the next few months, he spoke to her three or four times, and she never mentioned a workplace accident in any of these conversations. (Tr. 31). To his knowledge, Claimant was out for an illness. (Tr. 34). He testified that Claimant reported in to work for at least a year but he was not sure when the phone calls ceased. (Tr. 34).

Mr. Slater testified that the hatches on the dust bins are roughly eighteen to twenty inches in diameter and weigh about twenty pounds. He explained that since the hatches are hinged, they are pulled back rather than lifted up. (Tr. 32). The dust bins are reached by climbing a forty-five foot ladder. (Tr. 36).

Testimony of Todd Canatella

In late summer and fall 2000, Mr. Canatella was the plant superintendent. (Tr. 39). Mr. Canatella explained that Employer's policy on workplace accidents is that they should be reported immediately. (Tr. 44). In case of a workplace accident, the safety person accompanies the injured employee to a designated occupational heath facility and the supervisor in charge fills out an accident report, after which Mr. Canatella writes up a

report. (Tr. 44-45). All new employees are informed of the accident reporting policy when they undergo orientation. (Tr. 50-51).

After she went off work, Claimant called Mr. Canatella every Friday to report on her status. (Tr. 40). Mr. Canatella testified that Claimant never told him that she had been in a workplace accident until June 8, 2001. (Tr. 40-41). Up to that point, Mr. Canatella believed that Claimant was out for personal illness or injury because she filed her for short term disability under Employer's personal insurance carrier and never mentioned being injured at work. (Tr. 41-42). On Claimant's short term disability form, in response to the query about the cause of the symptoms, the box for "illness" was marked. (Tr. 42-44). This form was signed by Dr. Watermeier and Claimant. (Tr. 44, 46). Mr. Canatella affirmed that the diagnosis on the form was sprained neck, sprained thorax and sprained lumbar and that there was no mention of the flu. (Tr. 46-47). Mr. Canatella was aware that Claimant had neck and back problems but he and Claimant never specifically discussed the origin of her complaints. (Tr. 47).

He testified that Claimant is still employed by Employer but is out on long term disability. (Tr. 39).

Testimony of Carla Seyler

Ms. Seyler is a vocational rehabilitation counselor who conducted a vocational evaluation of Claimant on May 5, 2004. (Tr. 53). Before conducting her evaluation, Ms. Seyler reviewed various medical records, Claimant's deposition and a vocational report from a Department of Labor vocational counselor. Ms. Seyler testified that in that September 5, 2002 report, Beverly Mann, the vocational counselor, concluded that Claimant was unable or unwilling to participate in vocational rehabilitation services. (Tr. 54).

The purpose of Ms. Seyler's meeting with Claimant was to conduct a rehabilitation interview and do some vocational testing. (Tr. 55). She testified that Claimant possessed a culinary studies certificate but had worked for a number of years in an industrial setting. (Tr. 55-56). After conducting some reading and math tests, Ms. Seyler determined that Claimant could read at a fifth grade level and do math at a sixth or seventh grade level. (Tr. 56-57). Claimant told Ms. Seyler that she continued to have neck, back and spine problems with reduced strength in her right upper extremity since her carpal tunnel release. Claimant also reported that she was on pain medication. (Tr. 56). Claimant's treating physician, Dr. Watermeier, had released her to light duty work on April 28, 2003, restricting her from lifting more than twenty-five or thirty pounds on a repetitive basis and from prolonged standing or sitting for more than three to four hours at a time. (Tr. 57). Ms. Seyler noted that two other physicians had previously found that Claimant was able to return to work with no restrictions. (Tr. 58).

Based upon a review of the medical records, the interview with Claimant and the vocational testing reports, Ms. Seyler concluded that Claimant could return to work. At the light duty level, Ms. Seyler felt that Claimant was able to do such jobs as front desk clerk, answering service operator, hospital admission clerk and service advisor trainee. The wages for these jobs ranged from $6 to $8.75 per hour. (Tr. 58). If Claimant was returned to work with no restrictions, as per the findings of the non-treating physicians, she could return to her old job or perform a job as a material handler, which paid $9 to $11 per hour, or as a pipefitter helper, which paid about $9 to $12 per hour. (Tr. 58-59).

Ms. Seyler testified that most of the positions listed in her report were open and available at the time of her evaluation, and with the exception of the answering service operator position, all of these jobs had been available since 2000. (Tr. 59, 65). She felt that Claimant was able to compete for these jobs. (Tr. 59). Ms. Seyler affirmed that Claimant's pain medication could affect her ability to work but noted that she did not observe such effects during her interview with Claimant, although she did not know if Claimant had taken pain medication that day before their meeting. (Tr. 61-62). Ms. Seyler acknowledged that most industrial employers have policies against employees taking narcotic medication in a job setting unless the employer is aware of the situation before hiring such an individual. (Tr. 61-62).

Medical Evidence

Deposition of John J. Watermeier, M.D.

Dr. Watermeier, an orthopedic surgeon, first saw Claimant on September 13, 2000. (CX. 1, pp. 5-6). Claimant complained of pain in her neck, mid and lower back, numbness in both arms, aching in both legs and aching in the right knee. Claimant reported that her job consisted of lifting and climbing and that one day she went home and started feeling weak and ill. (CX. 1, p. 6). In her history of injury questionnaire, Claimant did not mark the box for work-related accident. (CX. 1, pp. 6-7). She reported no previous history of back or neck injury. (CX. 1, p. 7). Claimant had been having symptoms for about a month but did not report a specific date of accident. (CX. 1, pp. 6-8).

Upon examining Claimant, Dr. Watermeier found no objective abnormalities, and his impression was sprain of the muscles and ligaments of the neck, thoracic and lumbar spine. (CX. 1, pp. 8-9). The x-rays, which Dr. Watermeier took to rule out internal disc disruption, were also normal. (CX. 1, pp. 9-10). He put Claimant on temporary disability, prescribed pain medication, ordered a cervical and lumbar MRI and recommended physical therapy. (CX. 1, p. 10).

Claimant's September 22, 2000 MRIs were basically normal with some mild degenerative changes in the lumbar and cervical spine which were consistent with

Claimant's age and work history as a laborer. (CX. 1, pp. 10-11). On October 16, 2000, Claimant's complaints remained the same, but she reported that physical therapy aggravated her condition. No objective changes were noted. (CX. 1, p. 13). Dr. Watermeier injected pain medication into Claimant's spinal muscles and ordered a series of epidural spinal blocks to relieve her spinal pain. (CX. 1, pp. 13-14). An October 31, 2000 EMG and nerve conduction study by Dr. Salvatore Murra showed evidence of findings consistent with a diagnosis of carpal tunnel syndrome on the right side but no evidence of nerve root impingement from the neck or lower back. (CX. 1, pp. 11-12). Dr. Watermeier testified that carpal tunnel syndrome is not the kind of injury that would be caused by a one-time lifting event. (CX. 1, pp. 12-13).

Dr. Watermeier continued to treat Claimant conservatively for the next several months until he performed a carpal tunnel release in June 2001. (CX. 1, p. 14). Most of her health bills were paid through her health insurance plan. (CX. 1, pp. 18-19). He affirmed that in January 2001, Claimant's physical therapist reported some inconsistent test results and was unable to find any objective findings to correlate with Claimant's subjective complaints of pain. (CX. 1, pp. 15-16). Dr. Watermeier testified that after the June 28, 2001 carpal tunnel release, Claimant had minimal symptoms with regard to this condition. (CX. 1, p. 17).

In April 2003, Dr. Watermeier felt that Claimant had plateaued. She did not require any surgery for her neck or back and had recovered well from her carpal tunnel release. (CX. 1, p. 19). He determined that Claimant was able to return to light duty work in which she would be restricted from lifting more than twenty-five to thirty pounds on a repetitive basis but would be able to lift heavier amounts on an occasional basis. (CX. 1, p. 20). In addition, Claimant should refrain from prolonged standing or sitting for more than three or four hours at a time. (CX. 1, p. 25). On the other hand, she is able to perform work which requires repetitive climbing and lifting. (CX. 1, p. 24).

In Dr. Watermeier's opinion, Claimant's neck and back condition is of a chronic nature, stemming from a musculoligamentous sprain. (CX. 1, pp. 20-21). There are no objective findings that prevent Claimant from working, and Dr. Watermeier's restrictions are based solely upon Claimant's subjective complaints. (CX. 1, p. 22).

Deposition of Robert A. Steiner, M.D.

Dr. Steiner is an orthopedist who saw Claimant on August 8, 2002. (EX. 4, pp. 6-7). Claimant gave a history of neck, low back and right hand pain stemming from an August 24, 2000 workplace accident. (EX. 4, pp. 7-8). When Dr. Steiner saw her, Claimant complained of recurrent pain and swelling in her neck, constant low back pain and stiffness and recurrent cramping in her calves. She reported improvement in her right hand after carpal tunnel surgery but told Dr. Steiner that she continued to experience diminished strength with the use of the hand. (EX. 4, p. 7).

When he reviewed Claimant's September 2000 lumbar spine MRI, Dr. Steiner noted some degeneration which was typical for someone of Claimant's age but found no evidence of disk herniation. (EX. 4, pp. 13-14). Likewise, the cervical MRI indicated a mild bulge at C5-6 but no herniation or nerve root impingement. The October 31, 2000 EMG and nerve conduction studies showed no evidence of cervical or lumbar radiculopathy. (EX. 4, p. 14). Dr. Steiner testified that the April 30, 2001 cervical discogram merely indicated Claimant's subjective complaints when each disc was injected with dye. (EX. 4, pp. 14-15).

Upon physical examination, Claimant exhibited "pain-type behavior" in the form of grimacing, grunting and sighing. She also periodically held her hand over her lower back. (EX. 4, p. 9). Upon palpation, she reported diffuse tenderness at various points on her spine, but there were no muscle spasms. (EX. 4, pp. 9-11). The upper and lower extremity motor, sensory testing and deep tendon reflex exams were all normal. (EX. 4, pp. 10-11). According to Dr. Steiner, there were numerous inconsistent physical findings on the lumbar exam, including diffuse tenderness which was disproportionate to the amount of pressure applied. (EX. 4, p. 11). In addition, she exhibited inconsistent grip strength. (EX. 4, p. 16).

In sum, Dr. Steiner found no objective findings related to Claimant's back or neck. (EX. 4, p. 15). His diagnosis was minimal degenerative changes in the neck and lumbar area consistent with Claimant's age group. (EX. 4, pp. 15-16). In his opinion, Claimant did not require any additional treatment for her neck or back, and there was nothing preventing her from returning to work in any occupation. Dr. Steiner placed no restrictions upon Claimant, and he disagreed with Dr. Watermeier's opinion that Claimant was only able to return to light duty work. (EX. 4, p. 16).

Dr. Steiner testified that based upon the history related by Claimant, he could not relate her carpal tunnel syndrome to the workplace accident because this condition was likely pre-existing for some time before that day and in addition, "pulling on something does not cause a moderate or severe carpal tunnel syndrome." (EX. 4, p. 15). He agreed, however, that pulling on a rope could aggravate or accelerate a pre-existing wrist condition. (EX. 4, pp. 17-18).

Deposition of John R. Montz, M.D.

Dr. Montz is an orthopedic surgeon who conducted an independent medical examination of Claimant at the behest of the Department of Labor on February 18, 2003. (EX. 3, pp. 5-6, 8-9). At that time, Claimant gave a history of having experienced pain in her right hand, neck and lower back while pulling on a dust tank cover. (EX. 3, p. 6). She reported no prior injuries or problems to the neck, lower back or right hand. (EX. 3, pp. 6-7). Claimant told Dr. Montz that she was currently experiencing persistent neck and back pain but that her right hand was much improved since a carpal tunnel release.

(EX. 3, pp. 7-8). During the patient interview, Dr. Montz observed Claimant moving her neck from side to side and noted that she appeared to be in no significant pain. Upon physical examination, however, Claimant exhibited limited rotation and reported discomfort on extremes of motion. (EX. 3, p. 9). Her motor exam was normal, although she exhibited decreased grip strength on the right hand as compared to the left. (EX. 3, p. 10).

During the lumbar exam, Claimant had pain with flexion and extension but not with lateral bending. There was no evidence of muscle spasm although there was tenderness to relatively light touch. (EX. 3, p. 12). Dr. Montz explained that generally, even patients with significant pathology should not have severe tenderness to light touch and noted that such a finding could indicate exaggeration. (EX. 3, pp. 12-13). There was no evidence of weakness in the lower extremities, nor were there radicular symptoms in the lower legs. (EX. 3, p. 13). According to Dr. Montz, the fact that Claimant had no radiating symptoms in the arms or legs indicated that she did not have a nerve or disc problem. (EX. 3, p. 8). When Dr. Montz extended and flexed Claimant's big toe, she reported tingling in her calf, for which "there [was] no good reason." (EX. 3, pp. 13-14). Although Claimant had complained of occasional cramping in her left calf, Dr. Montz found nothing that would explain the complaint. Dr. Montz testified that Claimant's cervical and lumbar x-rays were essentially normal, as were her lumbar and cervical MRIs. (EX. 3, p. 14).

Dr. Montz found no objective physical findings to substantiate Claimant's complaints and noted that her neurologic evaluation was normal and her MRI films were consistent with her age. (EX. 3, p. 17). He was aware that Claimant had undergone a discogram which indicated pain at each level that was injected, but he explained that he considers discograms to be controversial and does not place much weight upon them. (EX. 3, pp. 18-19).

Dr. Montz's diagnosis was possible cervical and lumbar strain and right carpal tunnel release post-op. (EX. 3, p. 15). This diagnosis was based solely upon the history given by Claimant, as there were no objective findings of a strain, such as a muscle spasm. According to Dr. Montz, a strain injury brought on by lifting something heavy would typically resolve in six to twelve weeks. (EX. 3, p. 16). He testified that the accident described by Claimant is not the typical kind of mechanism to cause an onset of carpal tunnel syndrome, which is usually brought on by repetitive use of the hand or some sort of fracture about the wrist, as opposed to a one-time lifting event. (EX. 3, pp. 15-16).

Dr. Montz opined that Claimant had adequate time to recover from any possible soft tissue injury to her neck and back and should be able to return to her previous job without restriction. In addition, he felt that no further medical treatment was needed. (EX. 3, p. 17).

Records of River Parishes Physical Therapy/Performance Physical Therapy

Physical therapist Charles Tyner first saw Claimant on September 22, 2000, on a referral from Dr. Watermeier. Claimant complained of an onset of right cervical, shoulder, mid-back and low back pain which occurred after she left work on September 3. Mr. Tyner noted that Claimant was very guarded in her movements. After conducting an assessment of her cervical and lumbar spine, Mr. Tyner could not explain the "high amount of subjective complaints or stated limitations," nor could he discern any clear mechanical pattern of irritation. For those reasons, he was unsure of whether therapy would be beneficial to Claimant. (EX. 7, p. 10).

In an October 13, 2000 progress note, Mr. Tyner commented upon Claimant's inconsistent attendance at scheduled appointments. Claimant reported no significant changes in her symptoms despite the fact that she had been seen for a total of six visits since her initial evaluation. Again, Mr. Tyner found nothing objective to explain Claimant's complaints. He recommended either continued and consistent therapy and further medical investigation of the cause of Claimant's pain or a functional capacity evaluation (FCE) to determine Claimant's actual ability to perform work-related tasks. (EX. 7, p. 11).

In a December 12, 2000 progress note, Mr. Tyner again commented upon Claimant's sporadic attendance for scheduled appointments. Claimant told Mr. Tyner that she felt that her condition had worsened. Again, there were no objective findings to substantiate her complaints. Mr. Tyner expressed concern with Claimant's presentation of multiple non-organic signs and inconsistencies and once again recommended either further medical investigation or an FCE. Because of Claimant's sporadic attendance and heightened pain complaints, Mr. Tyner felt that she should be discharged from therapy due to lack of progress. (EX. 7, p. 12).

In a January 23, 2001 progress note, Mr. Tyner reported that Claimant had been seen a total of twenty-seven times since her referral but continued to report little to no change in her symptoms. Once again, Mr. Tyner expressed his concern that Claimant's pain behavior was inconsistent with the lack of objective findings. Mr. Tyner's findings had not changed and he reiterated his recommendation that Claimant be discharged from therapy for lack of progress. (EX. 7, p. 13).

Records of Gulf Coast Pain Institute

On December 5, 2000, Dr. Rand Metoyer examined Claimant on a referral from Dr. Watermeier. Claimant told Dr. Metoyer that she had been working at a grain elevator unloading ships when she developed pain in her neck and lower back. She denied any specific traumatic event. She complained of constant lower back pain. (EX. 8, p. 1).

Upon physical examination, Dr. Metoyer diagnosed Claimant with chronic lumbosacral strain with radicular component and agreed with Dr. Watermeier that Claimant should undergo a series of epidural steroid injections. (EX. 8, p. 2).

Vocational Evidence

Report of Beverly Mann

Ms. Mann is a rehabilitation counselor who contacted Claimant on August 28, 2002, to speak with her about the Department of Labor vocational rehabilitation program. Claimant told Ms. Mann that she was interested in the prospect of training for a new occupation but was uncertain of her ability to return to work. On September 3, 2002, after having reviewed Claimant's medical file, which contained conflicting opinions as to her ability to return to work, Ms. Mann asked Claimant if she felt physically able to work. Claimant told Ms. Mann that she could not work due to increased lower back and leg pain. Claimant anticipated the need for surgery for her neck and back. Ms. Mann suggested that Claimant postpone vocational rehabilitation, because she was an unsuitable candidate for the program given her belief that she was unable to work. (EX. 12, p. 1). Ms. Mann thereafter recommended that Claimant's file be closed because she felt unable to work at the present time. (EX. 12, p. 2).

IV. DISCUSSION

Credibility

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

In this case, serious doubts were raised as to Claimant's credibility with regard to her alleged workplace injury. Claimant never fully explained her failure to give timely

notice of the injury to Employer, nor did she explain why she originally used her personal health insurance to seek medical treatment, rather than making a claim with Employer's workers' compensation carrier. In addition, two doctors and a physical therapist noted discrepancies between Claimant's pain behavior and the objective medical evidence. For these reasons, I give less weight to both Claimant's testimony regarding the alleged workplace accident and her subjective pain complaints than I would in the absence of such evidence.

Timely Notice of Injury

Section 12(a) of the Act provides that notice of an injury or death for which compensation is payable must be given within thirty days after injury or death, or within thirty days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. It is the claimant's burden to establish timely notice.

Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period (Section 12(d)(1)) or that the employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34 (1989); Sheek v. General Dynamics Corp., 18 BRBS 151 (1986). Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978); White v. Sealand Terminal Corp., 13 BRBS 1021 (1981). Where the employer has knowledge of a work-related accident but does not have knowledge of the resulting injury, the employer will be deemed not to have knowledge of a work-related accident under Section 12(d). Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

The date of a medical diagnosis, although significant, is not always controlling. It does not exclude a finding that claimant knew or should have known of the relationship between his injury and his employment at an earlier date. On the other hand, one physician's unconfirmed diagnosis is not sufficient to make the claimant reasonably aware of a loss of wage-earning capacity in light of a contrary, though wrong, diagnosis by the claimant's treating physician and the claimant's continued ability to perform his work. Gregory v. Southeastern Maritime Co., 25 BRBS 188 (1991). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. Swanigan v. Maersk Pac. Ltd., 35 BRBS 23 (ALJ) (2001) (citing Thorud v. Brady-Hamilton Stevedoring Co., 18 BRBS 232 (1986)).

In this case, Claimant alleges a workplace injury occurring on August 24, 2000, and Employer alleges that it received no notice of this injury until June 8, 2001, when Claimant told Mr. Canatella that she was claiming a work-related injury. Claimant acknowledged at the hearing that she did not report the incident on the day it occurred and that when she first reported an injury to Mr. Slater on September 6, 2000, she did not specifically tell him that she had been injured at work. In addition, she admitted that, although she called Employer every Friday for over a year to report on her medical status, she had no specific recollection of telling the plant manager or supervisors that she had been injured at work. I therefore find that Claimant failed to provide timely notice in this case as mandated by § 12(a).

Mr. Canatella and Mr. Slater both testified that they had no knowledge of Claimant's injury until June 2001. Claimant herself does not recall telling anyone that she had been hurt at work. Thus, Claimant cannot show that Employer had knowledge of her alleged injury during the filing period, as per § 12(d)(1). However, Claimant argues that Employer was not prejudiced by the failure to give timely notice, because it was able to conduct full discovery and have Claimant examined by its choice of physician, Dr. Steiner. Employer, on the other hand, argues that the failure to give timely notice prevented it from having an opportunity to have Claimant examined shortly after the accident by its own doctor as per the company safety policy. By the time Drs. Steiner and Montz performed their respective evaluations in 2002 and 2003, two years had passed since Claimant's alleged injury, and the doctors could only speculate that Claimant might have suffered a strain which had resolved itself. In any case, neither doctor found any objective medical evidence to support Claimant's subjective complaints of pain, and Dr. Montz testified that strains usually resolve in six to twelve weeks. I therefore agree with Employer that in this instance, the passage of time between Claimant's alleged injury and the date of notice to Employer prevented Employer from any type of meaningful opportunity to participate in Claimant's care, such that Claimant's failure to give timely notice is not excused by operation of § 12(d). I find that Claimant's claim for compensation is time-barred for failure to give timely notice under § 12(a).

Causation

Section 20(a) of the Act provides the claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant proves these elements, the claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326 (1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prima facie case, the burden shifts to the employer to rebut the

presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

An injury occurs when something unexpectedly goes wrong within the human frame. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient. Darnell v. Bell Helicopter Int'l Inc., 16 BRBS 98 (1984). If an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable. The relative contributions of the work-related injury and prior condition are not weighted in determining the claimant's entitlement ("aggravation rule"). Wheatley, 407 F.2d at 307.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption by presenting substantial countervailing evidence that the injury was not caused by the employment. See 33 U.S.C. § 920(a). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a Claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999). In that case, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive evidence ruling out a causal relationship between the claimant's employment and his injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3d at 690.

As a result of a successful rebuttal of the presumption by the Employer, the fact finder must evaluate the record evidence as a whole in order to resolve the issue of whether or not the claim falls within the Act. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982). I must weigh all the evidence in the record and render a decision supported by substantial evidence. See Del Vecchio, 296 U.S. 280 (1935).

Even if Claimant's claim was not time-barred under § 12(a), she would still have to prove a causal link between her employment and her alleged injuries in order to recover under the Act. Claimant alleges that she injured her neck, back and right hand on August 24, 2000, while lifting the cover off a dust tank at work. As previously noted, Claimant did not report the injury that day, nor did she explain what had happened when she stopped work in early September 2000. Assuming that Claimant did injure herself as she described, it is certainly possible that such an accident could have caused neck and back problems. The medical evidence does not, however, support Claimant's subjective complaints of neck and back pain. For example, as early as September 22, 2000, a physical therapist could find nothing to explain Claimant's subjective complaints or

stated limitations with respect to the cervical and lumbar spine. Likewise, Drs. Steiner and Montz found no objective evidence to substantiate Claimant's subjective complaints of pain, and even Dr. Watermeier, her treating physician, acknowledged that his treatment of Claimant was based almost exclusively upon her subjective complaints rather than objective medical evidence. As previously stated, Claimant's credibility is subject to doubts, and consequently, her subjective complaints are outweighed by the objective medical evidence. I therefore find that no causal relationship exists between Claimant's alleged neck and back injuries and her employment.

As for the right hand, Drs. Watermeier, Steiner and Montz all agree that the accident described by Claimant is not the type of mechanism to cause carpal tunnel syndrome, which typically develops over time with repetitive use of the hand or, alternatively, as the result of a fractured wrist. Other than her own testimony, Claimant has presented no evidence to support the existence of a causal relationship between the alleged injury and the onset of carpal tunnel syndrome. Thus, Claimant has failed to establish a prima facie case for causation with respect to the right hand injury because even if an accident did occur, it was not the type of accident which could cause the injury alleged.

Although I have found that there is no causal link between Claimant's alleged injuries and her employment, I will analyze the nature and extent of these alleged injuries for the sake of completeness.

Nature and Extent

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

On August 8, 2002, Claimant was examined by Dr. Steiner. Dr. Steiner found no objective findings related to Claimant's back or neck. In the two years prior to her visit with Dr. Steiner, Claimant's neck and back pain complaints were consistent, and no improvements were noted. In fact, the physical therapy records suggest that Claimant may have already been at MMI by some time in the fall of 2000. Claimant's right hand condition, meanwhile, improved once she underwent the carpal tunnel release. Dr.

Steiner felt that the degenerative changes in the neck and lumbar area were consistent with Claimant's age group and required no additional treatment. He opined that Claimant could return to work in her previous occupation with no restrictions. Thus, I find that Claimant reached MMI with regard to the neck, back and right hand on August 8, 2002.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

Claimant in this case has failed to show that she is unable to return to her former employment. Both Dr. Steiner and Dr. Montz found no objective evidence of disability when they examined Claimant. In addition, even her treating physician, Dr. Watermeier, admitted that he only placed restrictions upon Claimant based upon her subjective complaints and that he had no objective basis for doing so. Having determined that Claimant's credibility with regard to her injury is questionable at best, I find no cause to rely upon the restrictions suggested by Dr. Watermeier when there is no objective medical evidence to support his recommendations. Thus, I find that Claimant is able to return to her former employment with no residual disability.

Medical Expenses

Section 7 of the LHWCA provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical

expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979). Although this issue was included on the stipulated list of disputed issues in this case, Employer argues that Claimant never raised the issue, and indeed, Claimant never mentions the need for reasonable and necessary medical expenses in the post-hearing brief. In addition, having found that Claimant's alleged injuries are not causally related to her employment and further, that Claimant has no residual disability, I therefore have no need to address this issue.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

Claimant's claim for benefits is hereby **DENIED**.

So ORDERED.

A

LARRY W. PRICE
Administrative Law Judge

LWP:bbd